No. 95-930

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

RADOSLAV MARIC, M.D.,

*Petitioner,*

vs.

ST. AGNES HOSPITAL CORP.; ROBERT J. STACKPOLE; ROBERT J. STANLEY; VINCENT DU VIGNEAUD, JR., M.D.; VINCENT NICOLAIS, M.D.; JOEL GREENSPAN, M.D.; MICHAEL PANIO, M.D.; DONALD N. COHEN, M.D.; VITO MARRERO, M.D.; BARNEY D. NEWMAN, M.D.; ADRIENNE WEISS-HARRISON, M.D.; ELLIOT MOSHMAN, M.D.; GERALD CAMPANA, M.D.; WILLIAM ZAROWITZ, M.D.; VIRGINIA PELLEGRINO,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF IN OPPOSITION OF THE ST. AGNES HOSPITAL RESPONDENTS

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## QUESTION PRESENTED

Should this Court exercise its discretion to grant review on a writ of certiorari where (1) neither "question presented" was preserved by the Petitioner or addressed below and (2) the court below concluded, after a detailed factual review, that the Respondents' conduct was "reasoned" and "responsible" under established Supreme Court precedent.

## STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent St. Agnes Hospital Corp. states that it has no parent company or subsidiary that issues shares to the public.

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The St. Agnes Hospital Respondents[1] respectfully request that this Court deny the petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Second Circuit. As set forth below, the Second Circuit found this case to be a candidate for sanctions, because it amounted to nothing more than a transparent attempt to conjure a "baseless" federal antitrust claim from a reasonable restriction of the Petitioner's hospital privileges following the death of one of his patients and his refusal to come to the hospital to examine another. Neither of the "issues presented" by the Petitioner was raised by any party or decided by the courts below. The decision of the Second Circuit Court of Appeals presents no conflict with decisions of any other United States Court of Appeals or this Court. Accordingly, the Petition raises no issue worthy of this Court's review and should be denied.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 65 F.3d 310 (2d Cir. 1995) and is reproduced in Petitioner's Appendix ("Pet. App.") at 3a. The memorandum and order of the United States District Court for the Southern District of New York is located at Pet. App. 12a.

## STATEMENT OF THE CASE

The facts of the case are more fully set forth in the opinions of the Court of Appeals and the District Court, to which the Court is respectfully referred (Pet. App. 3a-7a and 13a-16a, respectively). Because the Petitioner has misstated the facts of the

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[1] St. Agnes Hospital Corp., Robert J. Stackpole, Robert J. Stanley, Vincent du Vigneaud, Jr., M.D., Joel Greenspan, M.D., Vincent Nicolais, M.D., Michael W. Panio, M.D., Donald M. Cohen, M.D., Vito Marrero, M.D., and Virginia Pellegrino will be collectively referred to as the "St. Agnes Hospital Respondents".

case, however, they are briefly summarized below. Contrary to Petitioner's contention that he disclosed "to the Respondents" his plans to open a birthing center and that his hospital privileges were thereafter "suspended" on "pretextual" bases (Pet. at 2-4), the undisputed facts confirm the Second Circuit's conclusion that the hospital, faced with "questionable conduct" by Dr. Maric, "followed a course of action that was reasoned, responsible, and attentive not only to its own interests but also to those of the public and Dr. Maric" (Pet. App. 7a). As the court surmised, Petitioner's claim was likely the product of "poor advice of counsel or [Petitioner's] inability to perceive that his personal ambitions must at times yield to the hospital's interest in the health and safety of its patients. . . ." (Pet. App. 7a).

**A. Statement of Facts**

On July 1, 1989, Northeast Permanente Medical Group, P.C. hired the Petitioner as a staff gynecologist and obstetrician. Thereafter, as required by his employment contract, he sought and obtained staff privileges at St. Agnes (Pet. App. 3a). Several months later, Petitioner alleges he told defendant Robert J. Stanley of his plans to open a birthing center which would feature "birth in water", and Dr. Stanley promised the hospital's cooperation and signed a non-disclosure agreement on behalf of the hospital (Pet. App. 3a).

On November 26, 1989, Lori Alisa Cherry, a 26-year old woman who was about five months pregnant, was admitted to St. Agnes complaining of severe abdominal pain. She subsequently lost consciousness, respiration and palpable blood pressure, and the Petitioner and an internist were called. By the time the Petitioner arrived, Ms. Cherry had spontaneously regained blood pressure and respiration but was in a semi-comatose state. Dr. Maric examined her, concluded that her condition was unrelated to her pregnancy and, after discussing the case with the internist, left the hospital. The Petitioner's diagnosis

proved wrong, because Ms. Cherry died a few hours later from a ruptured ectopic tubal pregnancy with massive intra-abdominal hemorrhage (Pet. App. 3a-4a).

St. Agnes undertook an immediate investigation into the incident through several standing committees (Pet. App. 4a). A peer review by the Obstetrics and Gynecology Department concluded in February of 1990 that Dr. Maric's management of the case was deficient because of his failure to order additional tests, obtain a surgical consultation and remain with the patient until a diagnosis was reached (Pet. App. 4a). One of the defendants, Dr. du Vigneaud, the Director of the Department of Obstetrics and Gynecology, presented the findings to the Board of Trustees Quality Assurance Committee, and recommended that the Petitioner's cases be monitored (Pet. App. 4a). Because of the seriousness of the case, the Quality Assurance Committee ordered further review and ultimately recommended that the hospital monitor both Dr. Maric's and the internist's cases for a period of six months (Pet. App. 5a).

As required by law, St. Agnes also reported the incident to the New York State Department of Health ("DOH"), which investigated the death (Pet. App. 4a). On May 10, 1990, the DOH cited St. Agnes for deficiencies in its treatment of Ms. Cherry, including the Petitioner's failure to order certain tests and his decision to leave the hospital despite Ms. Cherry's rapidly deteriorating condition (Pet. App. 5a-6a).

In the meantime, while the reviews of the incident by both St. Agnes and the DOH were underway, Dr. Maric informed Dr. du Vigneaud of his plans to establish a birthing center, and he alleges that Dr. du Vigneaud also pledged his cooperation (Pet. App. 5a).

Less than two weeks after the St. Agnes Quality Assurance Committee recommended that the Petitioner's cases be

reviewed, another incident involving Dr. Maric's judgment occurred. On May 4, 1990, a woman exhibiting signs of a possible miscarriage was admitted to the hospital and, although both the hospital and the woman's husband repeatedly called Dr. Maric, he refused to come, claiming that earlier he waited in vain for the woman and that he was not really needed. The woman subsequently miscarried (Pet. App. 5a).

Faced with the DOH's finding on May 10, 1990 that Dr. Maric's treatment of Ms. Cherry had been deficient, as well as the May 4th incident, the hospital summarily suspended Dr. Maric's privileges on May 17, 1990 (Pet. App. 6a). Thereafter, Dr. Maric requested, under the by-laws of the hospital, a review of his suspension by an ad hoc committee, which concluded that the suspension was appropriate. Dr. Maric then presented his case at a Medical Board meeting, which recommended that he instead be placed on probation for one year, conduct all work under strict supervision, and receive a letter of reprimand. This recommendation was accepted by the Board of Trustees of St. Agnes (Pet. App. 6a).

Dr. Maric challenged the limitation of his privileges before the New York Public Health Council, pursuant to N.Y. Public Health Law § 2801-b. The Public Health Council found no cause to credit the complaint of Dr. Maric (Pet. App. 18a; J.A. 162).[2]

**B. The Proceedings Below**

Alleging that the restriction on his privileges forced him to abandon his plans for the birthing center, Dr. Maric subsequently sued the hospital, its administrators, and various doctors claiming a group boycott in violation of the Sherman Act,

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[2] "J.A." refers to the Joint Appendix filed by the parties on appeal to the Second Circuit Court of Appeals.

and intentional interference with contract and prospective contractual relations under state law (Pet. App. 6a).

The St. Agnes Hospital Respondents moved to dismiss the complaint for failure to state a claim, contending that Maric failed to plead necessary elements of a violation of section 1 of the Sherman Act. The remaining defendants answered and moved for summary judgment. Maric responded to both motions by submitting a single memorandum of law, contending that he had established the requisite elements of his claims (see J.A. 107). At oral argument, the District Court converted the St. Agnes Respondents' motion into a motion for summary judgment and permitted Maric and the St. Agnes Respondents thirty days to submit any additional papers on the motion. Maric subsequently submitted only his own affidavit to oppose the motion (J.A. 123), and the St. Agnes Hospital Respondents submitted affidavits with exhibits (J.A. 148, 287). At no point did the Petitioner serve a discovery request, nor did he submit an affidavit pursuant to Fed. R. Civ. P. 56(f) in response to the motions.

The District Court then granted summary judgment on the antitrust claim and dismissed the pendent state law claim without prejudice, holding that the hospital and its medical staff were not legally capable of conspiring, and that, in any event, Maric failed to raise a triable issue as to the existence of an unreasonable restraint on trade (Pet. App. 17a-19a).

The Second Circuit affirmed the dismissal. It did not reach the issue whether the hospital was legally capable of conspiring with its staff (Pet. App. 8a). Instead, after a detailed factual review, the Court of Appeals held that, even assuming legal capacity to conspire, the Petitioner failed to create a genuine issue of material fact as to the existence of a conspiracy to restrain trade, because he failed to cast doubt on inferences of proper conduct by the defendants, as required by applicable precedent:

> We do not have the slightest doubt that defendants acted properly when they decided to limit Dr. Maric's staff privileges. . . . There is no credible dispute that [the] lengthy review process yielded serious, legitimate concerns as to plaintiff's conduct. The hospital's ultimate decision to allow Dr. Maric to maintain his staff privileges under supervision instead of suspending or revoking them, under these circumstances, was generous towards the plaintiff.
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> * * * *
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> This case might well be a candidate for sanctions in light of the baseless nature of plaintiff's antitrust claim and the waste of resources that it has generated . . . .

(Pet. App. 9a-10a).

## REASONS FOR DENYING THE WRIT

### I.

### PETITIONER FAILED TO REQUEST DISCOVERY OR TO PRESERVE THE ISSUE BELOW

Petitioner first contends that this Court should grant certiorari because he was "prevented" from taking any discovery to show that the bases for restricting his privileges were "pretextual" (Pet. at i and 3). Plaintiff's statement is misleading and factually incorrect.

Contrary to the clear mandate of the Federal Rules of Civil Procedure and the law of this Circuit, *Paddington Partners v. Bouchard,* 34 F.3d 1132, 1137 (2d Cir. 1994); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), the Petitioner never filed an affidavit pursuant to Fed. R. Civ. P. 56(f) to seek discovery he now says was necessary to oppose the motions. In fact, at no point did the Petitioner ever serve a single discovery request. Rather, he repeatedly contended at each stage of the proceedings below that he had established the elements of his claims with the only "evidence" presented -- his own affidavit. Accordingly, Petitioner has failed to preserve this issue for review. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982). The Court should decline to address this issue, raised for the first time in the Petition. *See United States v. Ortiz,* 422 U.S. 891, 898 (1975).

## II.

## AN EFFECT ON INTERSTATE COMMERCE IS NOT IN DISPUTE

Petitioner's second "question presented" raises another issue for the first time in the Petition, curiously on a point conceded by the St. Agnes Hospital Respondents. Petitioner apparently asks the Court to decide whether a group boycott by independent physicians and a hospital can affect interstate commerce sufficiently to violate the Sherman Act (Pet. at i and 5). An effect on interstate commerce is certainly one element of a Sherman Act violation. However, none of the defendants ever raised this issue in their motions, nor did Petitioner address it below. Indeed, the District Court found that "[a]ll parties are engaged in interstate commerce, including the purchase of equipment and supplies across state lines and the receipt of insurance payments from out-of-state carriers" (Pet. App. 13a). Because Petitioner did not argue it, this issue was not addressed

by the Court of Appeals. Consequently, it is not now properly before this Court.

## III.

## NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND THE PRECEDENT OF THIS COURT

### A. The Court of Appeals Did Not Reach the Issue Whether Petitioner Met the Criteria for *Per Se* Treatment

As discussed above, the effect of a purported boycott on interstate commerce is not at issue in this case. In fact, the Petitioner does not discuss this issue in the text of the petition accompanying the question he posed (Pet. at 5). Instead, the Petitioner appears to argue in the text that he was not required to establish a genuine issue concerning the alleged harmful effect on competition because this conduct was *per se* unlawful, purportedly placing the Second Circuit's decision in conflict with precedent of this Court. At best, the Petitioner is confused about the basis for the Second Circuit's opinion and misconstrues this Court's decisions.

The District Court found that the Petitioner did not establish a *per se* violation because he did not "demonstrate that the challenged activity will likely have predominant anti-competitive effects" (Pet. App. 18a). Contrary to the Petitioner's representation, the Court of Appeals did not reach this issue. Rather, the Court of Appeals held, based upon facts specific to this case, that the Petitioner had failed to raise a triable issue concerning the existence of unlawful concerted action (Pet. App. 8a-10a). Thus, while the Court of Appeals affirmed the dismissal of the action, it did so on grounds other than those suggested by

the Petitioner. Accordingly, review by this Court of an issue not reached by the Court of Appeals is unnecessary and unwarranted.

**B. Well-Established Precedent Mandated a Rule of Reason Analysis and the Establishment of an Unreasonable Restraint of Trade**

In any event, Petitioner has posited (without articulating) an illusory conflict between the District Court's opinion and this Court's prior decisions. The District Court's application of the rule of reason to Petitioner's antitrust claim accords with the applicable precedent of this Court as well as legions of cases throughout the country which have considered this issue.

The cases cited by the Petitioner, *United States v. General Motors Corp.*, 384 U.S. 127 (1966) and *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941), merely stand for the proposition that a group boycott may, under certain circumstances, be illegal *per se*. Petitioner ignores more recent opinions of this Court which significantly limit the application of the *per se* rule to group boycotts by firms that possess either market power or exclusive access to an element the plaintiff needs for essential competition. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985).

The Court in *Northwest* explained that its prior decisions had applied the *per se* rule only when the practices at issue could not be justified by plausible arguments that they were intended to enhance overall competition and thereby make relevant markets more competitive. *Id.* A hospital has an "unquestioned right to exercise some control over the identity and number of physicians to whom it accords staff privileges". *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 (1984). Staff privilege restrictions help a hospital to "provide more efficient, higher quality service in order to compete against other hospitals." *Bhan v. N.M.E. Hospitals, Inc.*, 929 F.2d 1404, 1412 (9th Cir. 1991), *cert.*

*denied*, 502 U.S. 994 (1991). Therefore, precisely because staffing decisions have a significant procompetitive effect, a rule of reason is invariably used to evaluate their antitrust legality. *Flegel v. Christian Hosp.*, 4 F.3d 682, 686 (8th Cir. 1993); *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1571 (10th Cir. 1991); *Willman v. Heartland Hosp. East*, 836 F. Supp 1522, 1527 (W.D. Mo. 1993), *aff'd*, 34 F.3d 605 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995). Hospital staffing decisions are simply not so "plainly anticompetitive that no elaborate study of the industry is necessary." *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

The District Court's opinion therefore is not only in accord with firmly established precedent of this Court, but is consistent with virtually every district or circuit court that has addressed this issue. In the words of the Seventh Circuit:

> This case involves one hospital's decisions about staff privileges and staffing patterns. The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications are devoted to the issues those circumstances present. Those cases invariably analyze those circumstances under the rule of reason -- there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all.
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> * * *
>
> Those hundreds or thousands of pages almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of section 1 of the Sherman Act [citing cases]

*BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hospital Ass'n*, 36 F.3d 664, 667 (7th Cir. 1994).

To reiterate, although this issue was not addressed by the Second Circuit, the District Court's dismissal of Petitioner's antitrust claim upon his failure to establish a *per se* violation is in accordance with well-established precedent of this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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